IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

Petitioner,

vs.

WINFRED OVERHOLSER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

RICHARD ARENS
2000 P Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:

RUFUS KING
Southern Building
Washington 5, D. C.

INDEX

Table of Authorities

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

Petitioner,

vs.

WINFRED OVERHOLSER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 29-38) is reported at 288 F. 2d 388 (1961).

Jurisdiction

The judgment of the District Court was entered on June 27, 1960 (R. 19-20). The judgment of the United States

Court of Appeals for the District of Columbia Circuit was entered on January 26, 1961 (R. 45). Certiorari was granted by this Court on June 19, 1961 (R. 46). The jurisdiction of this Court in this matter rests upon 28 U.S.C. §1254(1).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

QUESTION PRESENTED

May petitioner, charged in the Municipal Court for the District of Columbia with two misdemeanors, be committed by said court to a mental hospital as not guilty by reason of insanity if it appears:

1. that he is judicially and medically recognized as competent to participate in the Court proceedings;

2. that he is adequately assisted by counsel and that he insistently and consistently attempts to enter a guilty plea, which is refused by the Court;

3. that a trial is held and testimony tending to raise a reasonable doubt concerning his mental health as of the time of the disdemeanors charged in the informations is adduced over his objection by the Court or Government in said proceeding;

4. that he lacks adequate notice that the central issue of his trial is to be his mental health as of the time of the misdemeanors in question;

5. that he is denied psychiatric facilities in rebuttal of testimony which is presented by psychiatrists within the employ of the Government in what turns out in effect to be a trial in which his mental health appears the central consideration;

6. that no finding is made by the Court that petitioner is suffering from mental illness as of the time of the adjudication or that he is then and there dangerous to be at large or in need of treatment at a hospital;

7. that the hospital to which he is committed suffers from the defects hitherto invariably associated with the system of public mental hospitals in this country, exemplified by inadequate housing and inadequate therapeutic facilities?

Statement of the Case

On November 6, 1959, two informations were filed against petitioner in the Municipal Court for the District of Columbia, charging petitioner with violations of the Bad Check Law of the District of Columbia, D. C. Code Ann. §22-1410 (R. 25-26). The petitioner "had never before been convicted of a criminal offense and had previously served honorably

as a commissioned officer in the armed forces" (R. 36).[1] In essence, petitioner, a respected businessman, was charged with overdrawing his bank account by one hundred dollars and with failing to make appropriate restitution within a period of five days.

The Municipal Court ordered petitioner committed to the District of Columbia General Hospital for examination to determine his mental competency to stand trial, pursuant to D. C. Code Ann. §24-301 (R. 23-26). Significantly, petitioner was not represented by counsel at this preliminary stage (R. 25). Accordingly, the preliminary commitment was not subject to challenge by petitioner's counsel and the failure of the petitioner to attack the Municipal Court's original order committing him to the District of Columbia General Hospital for a mental examination was clearly attributable to his lack of legal representation.

The Municipal Court appointed counsel to represent petitioner only at a later stage.[2]

Thereafter, the District of Columbia General Hospital reported on December 4, 1959, that the petitioner was "of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense" (R. 23).

Almost three weeks later, the District of Columbia General Hospital reported that petitioner was capable of participating in his own defense but that he had been suffering from a mental disease at the time of the crimes

[1] The United States Court of Appeals, in deciding this case, took judicial notice of facts presented in a subsequent habeas corpus proceeding filed by the petitioner in District Court. See *Lynch* v. *Overholser*, H.C. 171-60 (1960).

[2] The practice followed by the Municipal Court for the District of Columbia in the case of the petitioner has been set forth in petitioner's brief before the Court of Appeals and never denied.

charged in the informations and that the crimes, if any, were the products of said disease (R. 24). The following day, December 29, 1959, petitioner was brought before Chief Judge Smith of the Municipal Court as competent to stand trial upon the charges then pending against him (R. 25).

In accordance with Municipal Court practice, a plea of not guilty had been entered earlier in the case on behalf of petitioner, who was not then assisted by counsel (R. 21, 25). When confronting the Municipal Court on December 29, 1959, counsel having since been appointed for petitioner as a pauper, petitioner sought insistently and consistently to effect the withdrawal of the not guilty plea entered for him without his authority and to enter a guilty plea in its stead. Chief Judge Smith refused to accept petitioner's guilty plea and proceeded to the trial of the case notwithstanding the fact that he had found petitioner, after mental examination, competent to participate in the proceedings and hence by implication competent to enter a guilty plea (R. 3, 6, 7-11). Over the objection of the petitioner evidence was heard on the charges (R. 13, 20). A Government psychiatrist, representing the District of Columbia General Hospital, testified substantially in accord with the hospital report of December 28, 1959 (R. 13, 15-17). His testimony as well was taken over the objection of petitioner's counsel (R. 13).

Petitioner's counsel, aware of the lack of facilities in Municipal Court for the procurement of qualified psychiatrists not in the employ of the Government, at Government expense, produced no evidence challenging the only psychiatric testimony in the record. In other words, in the light of established Municipal Court practice, petitioner was denied any opportunity of independent psychiatric verification of the claims concerning his mental health which were

propounded by the one psychiatrist who testified for the Government or the Court.[3]

Chief Judge Smith thereupon entered a judgment of acquittal by reason of insanity and ordered petitioner committed to a mental hospital, purportedly pursuant to D. C. Code Ann. §24-301(d) (R. 21, 25). He conducted no hearing and he made no determination as to petitioner's then existing state of mind or social dangerousness or even as to his need for hospitalization at that time.

It may not be irrelevant to note that petitioner, upon his commitment, was placed in a department of St. Elizabeths Hospital which housed 1,000 other mental patients and which provided precisely two psychiatrists for their "care and treatment."[4]

A petition for a writ of habeas corpus was filed in the District Court on June 13, 1960 (R. 3-7). It alleged that the Municipal Court's refusal to accept the guilty plea proffered by petitioner, after petitioner had been judicially as well as medically recognized as competent, violated due process of law; it further alleged lack of due process in conditioning petitioner's loss of liberty upon the casting of the slightest doubt, provided that it be called reasonable,

---

[3] This Court is invited to note what has never been disputed below, to wit, that the Municipal Court for the District of Columbia lacks resources for the appointment of private psychiatrists in the case of an indigent person. Rule 28, F.R.Cr.P. is not duplicated within the context of the Municipal Court Rules.

[4] *Lynch* v. *Overholser*, H.C. 171-60 (1960) in the District Court for the District of Columbia, was drawn on by the Court of Appeals, as the basis of judicial notice of such facts as that petitioner is a former Lieutenant Colonel with an unblemished civic record. It is submitted that this Court may appropriately notice on the basis of the same case, viz., *Lynch* v. *Overholser*, H.C. 171-60 (1960), that petitioner was placed in a department of St. Elizabeths Hospital which housed 1,000 other mental patients and which provided precisely two psychiatrists for their "care and treatment."

upon his sanity; it directly challenged the right of Court or Government to foist an insanity defense upon an unwilling and competent defendant as a direct infringement and/or circumvention of the District of Columbia Civil Commitment Law which contains appropriate provisions for a hearing as to present mental illness under a standard of proof meeting the requirements of due process of law; it alleged that petitioner was deprived of liberty without due process of law in that there was no judicial finding of present dangerousness requiring commitment; it alleged further a lack of legislative intent to permit application of the automatic commitment clause of D. C. Code Ann. §24-301, save upon an acquittal based upon an affirmative assertion of the insanity defense by petitioner; and it further attacked the constitutionality of said clause on its face and as applied as violative of due process of law (R. 3-7).

The District Court ordered the writ issued (R. 6).

Upon Return and Answer by respondent (R. 7-11), Judge McGarraghy heard oral argument upon the writ (R. 12-18). At this time petitioner's counsel expanded the basis of his attack upon the commitment of petitioner by further challenging the fairness of the Municipal Court proceeding in which petitioner was "in effect . . . called upon to defend himself *not* upon the charge of uttering a check with intent to defraud, . . . [but] was called upon [*instead*] to defend himself against the charge of insanity" (R. 13-14). (Emphasis supplied.) If such a procedure were to be condoned, the petitioner's argument went on, surely a defendant, thus threatened with a mental commitment of unlimited duration, would be entitled to formal and seasonable notice as to what it was that he was called upon to defend himself against and, in addition, to adequate psychiatric facilities in rebuttal, which in the case of the indigent should of necessity

have included the appointment of private psychiatrists at Government expense (R. 18).

The District Court, thereupon, granted the writ and ordered petitioner restored to his liberty unless within ten days from the date of its order civil commitment proceedings, meeting appropriate standards of due process, were to be instituted. It did so upon the explicit assumption that "the Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law" (R. 19-20).

Respondent appealed to the United States Court of Appeals which heard this case *en banc* and then reversed the judgment of the District Court by a vote of 6 to 3. The majority specifically endorsed the proposition championed by the respondent that an insanity defense, whose success results in the automatic commitment of the defendant, can be foisted on an unwilling defendant who is mentally competent to participate in the criminal proceeding. Judges Edgerton, Bazelon and Fahy dissented (R. 28-45). See also *Overholser* v. *Lynch*, 288 F. 2d 388 (1961).

The sanguine prediction made by the majority of the Court of Appeals that "[n]ow that . . . [the petitioner] has received treatment, he is well on the way to unconditional release, without the probability of repeat offenses" (R. 37) has not been borne out by subsequent events. Several worthless checks appear to have been made out by petitioner while on a conditional release from St. Elizabeths Hospital. Accordingly, the conditional release was revoked on April 7, 1961 on the strength of the original Municipal Court order which had been upheld by the Court of Appeals. See *United States* v. *Lynch*, U.S. 7736-59 and U.S. 7737-59, Municipal Court for the District of Columbia.

This Court granted the petition for certiorari, filed by petitioner, after revocation of his conditional release, and permitted the petitioner to proceed *in forma pauperis* (R. 46).

SUMMARY OF ARGUMENT

I

The petitioner was subjected to forcible confinement in a public mental hospital, devoid of adequate facilities.

This deprivation was thrust upon him without notice and without any opportunity to contest, explain or refute.

The standard of proof utilized in determining the propriety of this deprivation was that of reasonable doubt concerning his mental health as of a past date.

Accordingly, the procedure lacked foundation in reason and fairness and violated due process of law.

II

The petitioner, who had been adjudged mentally competent to participate in the criminal proceeding then pending against him, was denied the right of waiving his defenses under circumstances gravely prejudicial to his interests.

1. The right to waive a personal defense is as precious as the right to assert it.

The denial, for example, of the right of waiving the privilege against self-incrimination may result in a reversion to the antiquated rule providing for the disqualification of parties and of interested persons as witnesses in their own behalf. This rule robs a person accused of crime of the greatest protection which an innocent man can have, i.e., the right to give an account of the matter. Such a rule is inconsistent with due process of law.

The insanity defense is not entitled to the high preferred place of constitutional privileges which have consistently been recognized as subject to waiver. Since the forcible imposition of the insanity defense in this case was calculated to deprive petitioner of his liberty for an indefinite period of time in a lunatic asylum, it cannot be viewed as comparable to putting the Government to its proof in the interests of the defendant.

2. The right to enter a guilty plea is a common law right. This right is subject to restriction only in cases of coercion or incompetency.

The court's discretion in the rejection of the guilty plea is limited to situations in which such a rejection is calculated to protect the defendant. No authority is granted to the court to reject the guilty plea under circumstances calculated to prejudice the defendant.

Significantly, the question in this case is not whether a plea of not guilty may be forced upon an unwilling accused with a view to sparing him life or loss of liberty, but rather whether a plea of not guilty may be forced upon an unwilling accused with a view to depriving him of his liberty for an indefinite period of time in a lunatic asylum.

3. Competency, in a system of accusatorial justice in a free society, presupposes the right of making a free choice in the conduct of legal proceedings. Reasons other than the fact that he is guilty may induce a defendant to plead guilty. In a society which places a prime value on the individual, the defendant must be permitted to judge for himself in this respect.

III

The petitioner was deprived of effective assistance of counsel when forced to proceed to trial after an attempted proffer of a guilty plea.

Petitioner was entitled to receive an informed estimate of his chances of acquittal and the likelihood of leniency in sentencing upon a guilty plea. Clients have traditionally depended upon such advice. In this case petitioner has been deprived of the right of following the advice of his counsel. In that process he has forfeited a substantial personal benefit traditionally linked to Sixth Amendment rights and never heretofore challenged in the courts.

IV

Application of D. C. Code Ann. §24-301(d) to petitioner violated due process of law.

1. The statutory section in question is void on its face.

Commitment under this section is mandatory following an acquittal by reason of insanity. It is not conditioned on a judicial finding that defendant is at the time of the trial, and not just at the time of the act charged, mentally ill and socially dangerous. It affords the defendant no opportunity to show cause why commitment to a mental hospital should be denied.

In brief, the statute authorizes condemnation without hearing.

Since a comparable statutory provision for civil commitment would be struck down as violative of due process of law, the D. C. criminal commitment law must fall likewise.

2. Application of the statute on the basis of the discretional invocation of the insanity defense invites arbitrary

action by reason of a lack of ascertainable standards and hence violates due process of law.

V

The forcible commitment of an individual to a mental hospital after an acquittal by reason of insanity or indeed the forcible commitment of any individual to a mental hospital can be justified solely upon the assumption that that individual will receive needed psychiatric treatment and rehabilitation.

Patently, lack of psychiatric treatment may mean confinement for life of patients who are curable.

The time has come to speak of "medical due process" in such a case.

Since adequate conditions of psychiatric care are denied to the petitioner, the petitioner's continued confinement is in violation of due process even if the extraordinary procedures in his case were to be condoned.

VI

The legislative history of D. C. Code Ann. §24-301(d) strongly suggests that the condition precedent to automatic commitment was to be nothing short of the affirmative invocation of the insanity defense. It further suggests that such commitment was not to apply to persons who had engaged in any kind of unlawful conduct, however minor, but only to persons who have engaged in unlawful conduct of a dangerous character.

VII

The supervisory power of this Court is invoked to prevent repetition of a commitment which must be viewed as inimical to the rational and efficient administration of jus-

tice. In converting the insanity defense from a shield of the accused into a sword of the prosecution, the Court of Appeals for the District of Columbia Circuit is effectively inhibiting the exploratory use of the mental examination by defendant's counsel.

Exercise of a power which stimulates avoidance of requests for mental examinations by defense counsel may in turn imperil the cause of the fair trial, in addition to jeopardizing the rational development of the insanity defense.

Introduction

The principal question in this case is not whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to sparing him life or loss of liberty. It is, rather, whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to depriving him of his liberty for an indefinite period of time in a lunatic asylum.

This question arises from the invocation of the mandatory commitment law under the Durham Rule.

District law allows for the hospitalization of a defendant in aid of a judicial determination of his competency to stand trial[5] and provides for the mandatory hospitalization of a

---

[5] D. C. Code Ann. §24-301(a) (Supp. VIII, 1960) provides in part:

"Whenever a person is arrested, indicted, charged by information, . . . for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of

defendant acquitted by reason of insanity.[6] In contrast to civil commitment law,[7] which provides for a hearing under standards meeting meticulous requirements of due process of law, the mandatory commitment clause of the criminal commitment law, here at stake, provides for no hearing as to the defendant's mental state as of the time of the acquittal, nor does it vest discretion in the trial judge to refuse commitment upon a showing of recovery from mental illness at the time of the trial.[8] Moreover, loss of liberty, under the mandatory clause of the criminal commitment law, is conditioned on nothing more than reasonable doubt concerning the mental health of the accused as of some past date. See *Tatum* v. *United States*, 190 F. 2d 612 (D.C. Cir. 1951).

Release from enforced hospitalization, following an insanity acquittal, is conditioned upon an affirmative showing that the patient has recovered and will not in the reasonable future be dangerous to himself or others.[9]

Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation . . ."

[6] D. C. Code Ann. §24-301(d) (Supp. VIII, 1960) provides in part:

"If any person tried . . . for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill."

[7] D. C. Code Ann. §21-306, et seq., provides for a hearing before a mental health commission and the right to a subsequent hearing before a jury in District Court, preliminary to the commitment of the citizen as of unsound mind. The burden of proof rests entirely upon the party seeking such commitment.

[8] D. C. Code Ann. §24-301(d) (Supp. VIII, 1960).

[9] D. C. Code Ann. §24-301(e) (Supp. VIII, 1960) provides:

"Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and

The Durham Rule, adopted by the United States Court of Appeals for the District of Columbia Circuit in 1954, holds a defendant to be entitled to acquittal by reason of insanity "if his unlawful act was the product of mental disease or defect." *Durham* v. *United States*, 214 F. 2d 862, at 874-75 (D.C. Cir. 1954). In pursuance of clearly humanitarian goals, the Court of Appeals for this Circuit has appropriately held that, for purposes of asserting the insanity defense, the assumption that psychosis is a legally sufficient mental disease, and that other illnesses are not, is erroneous. See *Briscoe* v. *United States*, 248 F. 2d 640, at 641, note 2 (D.C. Cir. 1957).

Under these circumstances, the superimposition of the *Lynch* doctrine, permitting an enforced insanity defense upon a recalcitrant and competent defendant, upon the *Durham* jurisprudence facilitating the exoneration of the defendant by reason of insanity, raises serious questions of due process of law and the right to effective assistance of counsel.

---

the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital . . ."

Ironically, it is the very humanitarian philosophy of *Durham* jurisprudence which, subverted by *Lynch*, threatens the liberty of large numbers of citizens. It is not far-fetched, in its light, to envision the presentation of psychiatric testimony at the behest of the prosecution that a parking violation is attributable to the tension generated by a mild and perhaps very widespread mental disorder, which is susceptible to psychotherapy. The *Lynch* doctrine, unless repudiated by this Court, would actually appear to encourage such a development. Presentation of such psychiatric testimony, without contradiction, would then result in the automatic commitment of the defendant to St. Elizabeths Hospital for an indefinite period of time—without any assurance of adequate psychiatric treatment. D. C. Code Ann. §24-301(d) (Supp. VIII, 1960). See, also, other materials concerning the present inadequacies of the public mental hospital, cited *infra*. Such automatic commitment, moreover, would seem likely even in the face of some contradiction since loss of liberty through commitment to a mental institution, when a crime is charged, would be conditioned not upon the establishment of the insanity of the accused by proof beyond reasonable doubt, or by a fair preponderance of evidence, or by substantial evidence, but would depend instead upon the casting of the slightest doubt, provided that it be called reasonable, on the defendant's mental health. See *Tatum* v. *United States*, *supra*.

The willingness of the prosecution to short-circuit civil commitment safeguards to effect the indefinite hospitalization of troublesome characters under criminal commitment law has been demonstrated in the past. See, e.g., *Williams* v. *Overholser*, 259 F. 2d 175 (D.C. Cir. 1958).

ARGUMENT

I.

The Petitioner's Commitment to St. Elizabeths Hospital, Although Not Criminal Punishment in Any Formalistic Sense, Involved the Infliction of Loss of Liberty and Other Concomitant Deprivations. It Did So Without Affording Him a Fair Hearing Upon the Issue of Insanity.

A. *The obvious and immediate consequence of forcible confinement to a public mental hospital is loss of liberty. The deprivation in the District of Columbia is compounded by the fact that loss of liberty for the hospital inmate, acquitted by reason of insanity, is indefinite and restoration to society is dependent primarily upon the almost unlimited discretion of an overburdened hospital staff, devoid of adequate therapeutic resources.*

To say that the imposition of a fine or probation is "punishment" requiring the most ponderous of procedural protection while lifelong or extensive confinement to a mental hospital is devoid of all punitive effects and hence requires no procedural protection whatsoever is to deny the very spirit of the Constitution.[10]

The significance of the deprivation inherent in commitment and the need for adequate procedural safeguards against improvident commitment has been increasingly rec-

[10] It is common learning that this Court has moved far and fast upon the road of unequivocal rejection of the "conventional assumption that 'criminal' and 'civil' sanctions differ in nature as well as in purpose." See Dession, *Sanctions, Law and Public Order*, 1 VAND. L. REV. 8, at 14 (1947).

ognized by courts throughout the country. *State* v. *Mullinax*, 364 Mo. 858, 269 S.W. 2d 72 (1954); *Appeal of Sleeper*, 147 Me. 302, 87 A. 2d 115 (1952); *State* v. *Arnold*, 356 Mo. 661, 204 S.W. 2d 254 (1947); *In re Lambert*, 134 Cal. 626, 66 P. 851 (1901).

As expressed by the Supreme Court of Ohio in *State* v. *Bushong*, 159 O. St. 259, 111 N.E. 2d 918, at 921 (1953):

> "The sending of a person to an institution for the criminal insane, even for a short time, is a serious matter and his confinement there is as full and effective a deprivation of personal liberty as is his confinement in jail."

In some respects, moreover, the inmate of St. Elizabeths Hospital, acquitted by reason of insanity, has reason to envy the prisoner in our penal institutions. While ostensibly committed for purposes of treatment, the patient in the public mental hospital is rarely assured of any kind of psychotherapy and, in fact, is often exposed to drastically counter-therapeutic conditions. This Court might well take judicial notice of the fact that the average legislative budgetary grant has been so notoriously inadequate as to fail to provide satisfactory living conditions, let alone adequate conditions of medical care.

The conditions prevailing in our public mental hospitals have been aptly described by a pioneer in the investigation of the public mental hospital. DEUTSCH, THE SHAME OF THE STATES (1948). Albert Deutsch, reporting to a Senate Committee only this year, declared with reference to his earlier study:

> "I found evidence of physical brutality [in public mental hospitals] but . . . [this] paled into insignificance when compared with the excruciating suffering stemming

from prolonged, enforced idleness, herd-like crowding, lack of privacy, depersonalization and the overall atmosphere of neglect."

Referring to the present, he summarized available evidence concerning the public mental hospital as follows:

"The chronically acute shortage of physicians in most wards makes the term 'psychotherapy' a hideous mockery for most patients. In most public mental hospitals, the average ward patient comes into person to person contact with a physician about 15 minutes every month . . . " I HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 87th Congress, 1st Sess., March 28, 1961, 42-44 (1961).

The situation in public mental hospitals as of 1958 has been authoritatively described in these terms in the *American Journal of Psychiatry*:

"After 114 years of effort, in this year 1958, rarely has a state hospital an adequate staff as measured against the minimum standards set by our Association, and these standards represent a compromise between what was thought to be adequate and what it was thought had some possibility of being realized. Only 15 states have more than 50 percent of the total number of physicians needed to staff the public mental hospitals according to these standards. On the national average registered nurses are calculated to be only 19.4 percent adequate, social workers 36.4 percent, and psychologists 65 percent. Even the least highly trained, the attendants, are only 80 percent adequate.

" . . . In many of our hospitals about the best that can be done is to give a physical examination and

make a mental note on each patient once a year, and often there is not even enough staff to do this much." Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, at 7 (1958).

On the basis of available public documents, this Court might further take judicial notice of the fact that the District of Columbia is not an exception to the gloomy picture portrayed by these competent and unbiased observers of the general scene.[11]

The specific failure of St. Elizabeths Hospital to meet the minimal standards of the American Psychiatric Association in the doctor-patient ratio for public mental hospitals can be verified by perusal of the American Psychiatric Association's authoritative manual, entitled *Standards for Hospitals and Clinics*, 44-45 (rev. June 1958). Existing conditions in parts of the hospital inspected by the local press are not consistent with even elementary concepts of safety and sanitation, let alone adequate twentieth century psychiatric care.[12]

---

[11] It has been aptly observed:

"It is ironic that the Congressional committee responsible for the adoption of the mandatory commitment statute had included in its report a statement which recognized that the hospital facilities used to treat persons in need of psychiatric examination or treatment under the criminal procedures are inadequate." Comment, *Criminal Law—Defense of Insanity—Mandatory Commitment Statute Under the Durham Rule*, 15 RUTGERS L. REV. 624, at 631 (1961).

[12] See Washington Post, November 27, 1960, p. A1:

"An inscribed stone is imbedded in the threshold of a building at St. Elizabeths Hospital—home to some 7000 of the mentally sick.

"It reads: Built, 1853-54; repaired, 1872.

"One of the building's crowded men's wards is a kind of all-purpose room used for sleeping, eating and watching TV. Some of the patients pace it among a profusion of tables,

It is not unfair to state in the light of undisputed testimony that parts of St. Elizabeths Hospital have degenerated into mere detention centers, devoid of any therapeutic program worthy of the name. As pointed out in the statement of the case, the petitioner, upon his commitment, was placed in a department of St. Elizabeths Hospital which housed one thousand other mental patients and which provided precisely two psychiatrists for their care and treatment. If it is borne in mind that a substantial part of the time of such "psychiatrists" is spent on administrative matters and testifying in court, the pretense of any therapeutic program becomes indeed the hideous mockery referred to by the late Albert Deutsch.

This Court will also recall that not too many years ago in judicial proceedings within this Circuit the place of confinement for the "criminal insane" at St. Elizabeths Hospital was described "without contradiction" as a place characterized by "noisome, unnatural and violent acts by inmates," in fact, as a place of confinement "for the hopeless and the violent, not a place of remedial restriction." *Miller* v. *Overholser*, 206 F. 2d 415, at 418-419 (D.C. Cir. 1953).

The stigma arising out of an adjudication of insanity is thus easily visualized.

The loss of control over property may be yet another deprivation flowing from an adjudication of insanity. Cer-

---

beds, and benches. Others are frozen into a tableau; their eyes closed in almost endless sleep or focused on the 17-inch screen.

"The only bath is a shower with leaky joints bound by rags which fail to keep the water from squirting into the center of the room where it forms a puddle.

"The walls are heavy with layers of paint, which peel and buckle like paper. The human odors have so permeated the century-old woodwork that they defy the strongest of modern detergents."

tainly, this loss can be a consequence of civil commitment. See, e.g., D. C. Code Ann. §21-303 (1901). Whether such loss can be a consequence of commitment by virtue of an acquittal by reason of insanity does not seem clear at this time. In some jurisdictions the mere fact of mental hospitalization has brought such incompetence in its train. See Ross, *Commitment of the Mentally Ill*, 57 MICH. L. REV. 945, at 979-995 (1959).

It well may be, therefore, that the civil disabilities flowing from an adjudication of insanity are significantly more severe than those flowing from a conviction for a misdemeanor, the alternative which the petitioner sought to elect in this case.

Moreover, while a prisoner in one of our penal institutions can look forward to certain release upon the expiration of a set period of time, a prisoner held at St. Elizabeths Hospital, by virtue of an acquittal by reason of insanity, may linger indefinitely and, in fact, for the rest of his life. This may be the petitioner's fate if his commitment is allowed to stand.

The release procedures, created by Congress and interpreted by the United States Court of Appeals for this Circuit, have made the St. Elizabeths' inmate subject to the almost unlimited discretion of his jailers.

An individual defendant, acquitted by reason of insanity in the District of Columbia, is viewed by the Court of Appeals for this Circuit as a member of a "special class" whose release from confinement is conditioned upon his "establishing his eligibility" therefor under exacting conditions. See *Overholser* v. *Leach*, 257 F. 2d 667, at 670 (D.C. Cir. 1958). In sum, a defendant acquitted by reason of insanity must affirmatively establish freedom from any "abnormal mental condition"—a term encompassing any and all mental disorders, however mild. *Overholser* v. *Russell*, 283 F. 2d 195 (D.C. Cir. 1960). In this context

he must also prove the absence of any form of social dangerousness. This social dangerousness, moreover, has been viewed by the majority of the Court of Appeals as capable of being manifested by nothing more than a "check writing proclivity," stemming from a "psychoneurotic reaction." *Overholser* v. *Russell, supra.*

In a word, the release of the St. Elizabeths' inmate is authorized only upon an affirmative certification by the hospital authorities that he has recovered from mental illness and is not likely to be dangerous to himself or others in the reasonable future. In the absence of such a certification his freedom depends upon proving, by what for all practical purposes amounts to evidence beyond reasonable doubt, that the hospital authorities have been arbitrary and capricious in failing to make the required certification and that he has indeed recovered from his mental illness in the manner indicated. See D. C. Code Ann. §24-301(e) (Supp. VIII, 1960). See also *Overholser* v. *Russell, supra; Ragsdale* v. *Overholser,* 281 F. 2d 943 (D.C. Cir. 1960); *Hough* v. *United States,* 271 F. 2d 458 (D.C. Cir. 1959); *Overholser* v. *Leach, supra,* at 669.

In this light, inadequacy of facilities for appropriate psychiatric treatment may render the subjection of the citizen to confinement at St. Elizabeths Hospital, pursuant to an insanity acquittal, more serious by far than confinement in a conventional prison. For too many, under existing circumstances, the mental hospital is transformed into a penitentiary which does not even permit the hope of any future release.[13]

---

[13] An excellent portrayal of the plight of such St. Elizabeths patients is provided by Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei,* 49 GEO. L. J. 294 (1960).

B. *In transforming the so-called hearing before it from a hearing on the merits of the charges to a hearing principally addressed to the question of whether petitioner should be committed to a mental institution, the Municipal Court for the District of Columbia denied to petitioner the rudimentary rights associated with any official hearing aimed at the control of the activities of the citizen.*

(1) "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert* v. *California*, 355 U.S. 225, at 228 (1957). Notice, in any meaningful sense, was denied to the petitioner in the Municipal Court.

Petitioner, whose liberty was put in jeopardy by an enforced insanity defense, had no formal notice that his hearing upon a criminal charge would be transformed into a hearing upon his sanity. Moreover, the inversion of the roles of the prosecution and defense upon the rejection of petitioner's guilty plea nullified even the possibility of informal notice, if it ever existed. In brief, petitioner, as well as his counsel, were unaware of the new roles they were expected to play in the trial in which the usual and conventional positions were turned topsy-turvy.

(2) A meaningful opportunity to test, explain, and refute is essential to nothing more serious than an interference with property rights and commercial activities. See, e.g., *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U.S. 292 (1937). This opportunity was denied to the petitioner by the Municipal Court.

In the context of petitioner's case in the Municipal Court, a meaningful opportunity to test, explain and refute could mean nothing more nor less than an opportunity for independent psychiatric scrutiny of the facts and the procurement of private psychiatrists on behalf of the petitioner. Since petitioner was indigent, this opportunity could be accorded to him only if private psychiatrists were made available to him at Government expense. This opportunity was not accorded to petitioner. As expressed by Mr. Justice Black for this Court:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U.S. 12, at 19 (1956). Cf. *Barbier* v. *Connolly*, 113 U.S. 27, at 31 (1885).

The petitioner's trial in Municipal Court depended entirely upon the amount of money he had, or, rather, he did not have. His indigency resulted in a loss of opportunity deemed essential to due process in hearings affecting nothing more meaningful than the disposition of property rights.[14]

In effect, the petitioner was deprived of his liberty without an opportunity to be heard upon the subject of his mental health. It would follow that his confinement lacks constitutional validity as a consequence. See *State* v. *Mullinax, supra; Barry* v. *Hall*, 98 F. 2d 222 (D.C. Cir. 1938); *In re Lambert, supra.*

---

[14] The case of *United States* v. *Baldi*, 344 U.S. 561 (1953), cannot be viewed as authority for the proposition that the right of independent psychiatric expertise is irrelevant to due process. While this Court did state that it could not "say the state has . . . [the] duty by constitutional mandate" to appoint a private psychiatrist to make a pretrial examination of a defendant in a *state* criminal proceeding, it did so in the context of a case in which psychiatric expert witnesses had in fact been available to the defendant in his trial.

(3) A standard of proof consistent with reason and fairness is requisite to any proceeding aimed at the control of the citizen, whether by administrative or judicial means. Such a standard was denied to the petitioner in the Municipal Court.

It is impossible to see how commitment to a mental hospital can be effected by proof which is less than clear, convincing and satisfactory, without transgressing the constitutional command of due process. See *Ex parte Romero*, 51 N.M. 201, 181 P. 2d 811 (1947); *In re Olson's Guardianship*, 236 Wis. 301, 295 N.W. 24 (1940).

Specifically, the standard of proof applicable to the petitioner's hearing in Municipal Court, when what appeared to be a criminal prosecution was transformed into an inquisition of petitioner's sanity, was solely that of reasonable doubt concerning the petitioner's sanity as of the time of the crimes charged in the informations. In this context, since the Government needed evidence only sufficient to raise a reasonable doubt concerning petitioner's sanity, petitioner was in practical effect under the burden of disproving insanity beyond all reasonable doubt—if he were to prevail against the Government in this matter.[15] See *Davis* v. *United States*, 160 U.S. 469 (1895); *Tatum* v. *United States*, 190 F. 2d 612 (D.C. Cir. 1951). Clearly, this is a most unequal contest in which the petitioner cannot be deemed to have been afforded due process of law. It is not likely that this by-passing of conventional procedures for commitment of the mentally ill could have been authorized by this Court in *Davis* v. *United States, supra*.

[15] For a lucid discussion of the inequality of the contest thus forced upon petitioner, see Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, at 938-940 (1961).

Aside from the obvious unfairness to petitioner, the procedure employed in the petitioner's case by the Municipal Court can hardly be denominated rational.

The observation is relevant in this context that "*the rule of substantial evidence* is one of fundamental importance and *is the dividing line between law and arbitrary power.*" *National Labor Relations Board* v. *Thompson Products*, 97 F. 2d 13, at 15 (6th Cir. 1938). (Emphasis supplied.) As expressed by this Court, the greatest flexibility in administrative procedure cannot be deemed to authorize orders "without a basis in evidence having rational probative force." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, at 230 (1938). Condonation of the proceedings of the Municipal Court will constitute in effect authorization by this Court for the issuance of orders affecting human liberty upon a doubt, however reasonable, i.e., "without a basis in evidence having rational probative force," as those terms have been traditionally understood and applied in this country. Thus authority will be provided to any trial court to pass "the dividing line between law and arbitrary power." [16]

The observation of a recent legal publicist in considering the impact of some forms of forensic psychiatric practice on the civil liberties of the individual does not, at this point, seem inapposite:

> "Aristotle observed long ago that 'punishment is a sort of medicine.' We have considerable cause today to

[16] If this were permitted to come to pass, loss of liberty would be conditioned upon what in effect amounts to suspicion alone. It cannot be claimed that this method is consistent with ordered liberty. See, e.g., *People* v. *Pieri*, 269 N.Y. 315, 199 N.E. 495 (1936); *Albertson* v. *Schmidt*, 128 Cal. App. 344, 17 P. 2d 158, at 159 (1932).

observe that medicine can be a sort of punishment, *sans* due process of law." De Grazia, *The Distinction of Being Mad*, 22 U. of Chi. L. Rev. 339, at 355 (1955).

II.

An Accused, Adjudged Mentally Competent to Participate in a Criminal Proceeding, Has the Right to Waive Any and All Defenses, Not Jurisdictional in Character, Including Those Involving Constitutional Privilege. The Assertion of Such a Right May, as in This Case, Be Essential to a Proceeding Meeting Requirements of Due Process of Law. This Has Been Denied to the Petitioner.

A. *The right to waive personal defenses is as precious as the right to assert such defenses. Even constitutional defenses which are not jurisdictional in character are subject to waiver and indeed that right of waiver is often essential to due process itself.*

The Courts have consistently recognized the right of waiver of constitutional safeguards. See, e.g., *Patton* v. *United States*, 281 U.S. 276 (1930); *Raffel* v. *United States*, 271 U.S. 494 (1926); *Edwards* v. *United States*, 256 F. 2d 707 (D.C. Cir. 1958); *United States* v. *Sturm*, 180 F. 2d 413 (7th Cir. 1950).

As stated in *Barkman* v. *Sanford*, 162 F. 2d 592, at 594 (5th Cir. 1947):

> "It seems thoroughly established that an intelligent accused may waive any constitutional right that is in the nature of a privilege to him or that is for his personal protection or benefit."

The significance of the right of such waiver to a fair defense has been aptly set forth in *Starr* v. *State*, 5 Okl. Cr. 440, 115 P. 356, at 367 (1911):

> "Generally speaking, the constitutional provisions guaranteeing to every accused person in a criminal action certain rights may be separated into two classes. First, those in which the public generally, and as a community, is interested, as well as the accused, and which are jurisdictional as affecting the power of the court to try the cause, second, those more in the nature of privileges which are for the benefit of the accused alone, and do not affect the general public. The former cannot be waived. Jurisdiction to try the cause is conferred by the law. Consent cannot confer jurisdiction, but *the accused may waive a constitutional right or privilege designed for his protection*, where no question of public policy is involved. The public as well as the accused have an interest in every criminal trial. The life and liberty of the citizen is a matter of supreme importance to the state, and it should not allow him to throw either away by a failure, intentional or otherwise, to take advantage of his constitutional safeguards. *It will not do, however, to say that because the state has a peculiar interest in protecting the citizen accused of crime to the extent of his constitutional rights that he shall in no case be allowed to waive them, for in some cases it may be to his interest to waive them, and the denial of the right to do so would defeat the very object in view when the rights were given, and cause them to operate to the injury rather than to the benefit of the accused.*" (Emphasis supplied.)

It is elementary that the privilege against self-incrimination is subject to waiver. The obvious requires emphasis

in this context. Were the privilege against self-incrimination not subject to waiver, the ensuing trial might well constitute a rejection of a rule of reason essential to fair trial. For the refusal to recognize the right of waiving the privilege against self-incrimination would prevent the accused from testifying in his own behalf and would thus constitute a reversion to the discarded rule of by-gone days which provided for the disqualification of parties and of interested persons as witnesses on their own behalf and which did not permit the accused the right to summon witnesses in his defense in criminal cases. See II WIGMORE, EVIDENCE, §575-579 (3rd ed. 1940). This rule has been appropriately described as "barbarous." *Ibid.* It is self-evident that it robs a person accused of crime of the "greatest protection which an innocent man can have . . . [i.e., the protection inherent in the right] to give an account of the matter . . . " *Id.*, §579.

It requires no elaborate argument to show that such a rule cannot be squared with the requirements of due process.

The Sixth Amendment right of assistance of counsel may indeed be subject to waiver too as a matter of due process of law. As stated by the Court in *MacKenna* v. *Ellis*, 263 F. 2d 35, at 41 (5th Cir. 1959):

> "The defendant, being sui juris and mentally competent, had a *right* to rely on his own skill and ability to conduct his defense in person without the assistance of counsel; and the Court was not justified in imposing assigned counsel upon the defendant against his will." (Emphasis supplied.)

The insanity defense is not entitled to the high preferred place of the privilege against self-incrimination or of the right to assistance of counsel in our system of criminal justice.

The refusal to recognize the right of waiving an insanity defense would, as shown above, involve an inversion of the roles of prosecution and defense and the infliction of a negative sanction on the basis of a mere doubt; in sum, it would operate as oppressively as the refusal to recognize the right of waiving the privilege against self-incrimination. The rule established by this Court in *Davis* v. *United States*, 160 U.S. 469 (1895), requiring the trial court to consider evidence of insanity concerning the accused, regardless of whether such evidence was produced by prosecution or defense witnesses, can be reasonably interpreted only as creating a shield for the accused, not a sword for the prosecution. It would seem a mockery of the spirit of our institutions to permit a right, created for the protection of the accused, to be transformed into a means for the indefinite confinement of the accused at the behest of the Government.

One is bound to add that the insanity defense is by no means the only defense which could be used by the Government to defeat the interests of the defendant. The Government, for example, could assert with equal ease the defense of alibi. Thus a guilty plea to a parking violation might be barred upon the representation by the Government that the defense of alibi should be submitted to the court. Following the procedure condoned by the Court of Appeals in *Lynch*, the Government might then attempt to show that the defendant could not have been guilty of the parking violation because precisely at the time of the violation charged in the information he was engaged in sabotaging military installations, attending a meeting called by a Communist-infiltrated group, or keeping an illicit tryst with a neighbor's wife. While, of course, no conviction could be obtained under such circumstances, the deprivation inflicted upon the defendant by this "defense" might constitute punishment infinitely more severe than any that could be in-

flicted after conviction upon the charge in question. This is transformation of the accusatorial into the inquisitorial system of justice without the safeguards of the latter. See generally ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE (1913).

As stated by Mr. Justice Moody, for this Court, in *Twining* v. *New Jersey*, 211 U.S. 78, at 101 (1908), "no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

B. *The right to enter a guilty plea is embedded in the common law. The common law rule, in turn, must be viewed as incorporated within the Federal Rules, invoked in this case.*

The *right* to enter a guilty plea and to waive his defenses is secured to the defendant under the common law, once it is clear that the defendant is competent and that his action is voluntary.

To be sure, Archbold declared it to be sound judicial practice to warn the defendants before the bar of justice as to the consequences of a guilty plea. Immediately, however, he went on to declare:

> "If . . . they still persist in their plea of guilty, it is then recorded . . . and in the record, when made up, the judgment . . . follows the plea." I ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE, 355-356 (Waterman ed. 1860).

II Bishop, New Criminal Procedure, §795 (1913), decisively enunciated the common law rule as follows:

> "Undoubtedly a prisoner of competent understanding, duly enlightened, has the *right* to plead guilty instead of denying the charge." (Emphasis supplied.)[17]

The right to enter a guilty plea has been repeatedly recognized by state courts. Thus, in substantially identical language state courts have held time and again that "[i]n a criminal prosecution a defendant has a *right* to plead guilty . . . " *Williams* v. *State*, 89 Okl. Cr. 95, 205 P. 2d 524, at 542 (1949); *Canada* v. *State*, 144 Fla. 633, 198 So. 220, at 223 (1940); *Pope* v. *State*, 56 Fla. 81, 47 So. 487, at 488 (1908). (Emphasis supplied.) The matter has been stated incisively by the Supreme Court of the State of Iowa in these terms:

> "It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the state may be deprived of the services of the citizen, and yet the state never actively interferes in such a case, and the right of the defendant to so plead has never been doubted. *He must be permitted to judge for himself in this respect.*" *State* v. *Kaufman*, 51 Iowa 578, 2 N.W. 275, at 276 (1879). (Emphasis supplied.)

---

[17] Contrary to respondent's contention in respondent's brief in opposition to the petition for certiorari, Blackstone can be quoted only in support of the common law rule as enunciated above:

> "Upon a simple and plain confession, *the court hath nothing to do but to award judgment:* but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally *advise* the prisoner to retract it, and plead to the indictment." IV Bl. Com. 329 (Cooley ed. 1899). (Emphasis supplied.)

Speaking for this Court in *Kercheval* v. *United States*, 274 U.S. 220, at 223 (1927), Mr. Justice Butler declared:

> "*A plea of guilty* differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it *is conclusive. More is not required; the court has nothing to do but give judgment and sentence.* Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." (Emphasis supplied.)

See also *Patton* v. *United States*, 281 U.S. 276, at 307-308 (1930):

> "In this respect we fully agree with what was said by the Supreme Court of Wisconsin in *Hack* v. *State*, 141 Wis. 346, 351, 352, 45 L.R.A. (N.S.) 664, 124 N.W. 492:
>
> 'The reasons which in some sense justified the former attitude of the courts have . . . disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser [than capital] crime or misdemeanor, who comes into court with his attorney, fully advised of all of his rights, and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.'"

Yet another succinct and authoritative summary is provided by the Court in *West* v. *Gammon et al.*, 98 F. 426 (6th Cir. 1899):

"But while the right of everyone to have his cause tried, or to be tried himself if accused of crime, by a jury, is guaranteed and established beyond the power of the legislature to abridge it, the Constitution does not compel anyone to exercise the right thus secured; and there is no reason whatever to suppose that its makers designed to repeal or alter the moss-grown rule of the common law, 'by which a party indicted for an offense, however grave in its nature, may enter a plea of guilty thereto, if he sees fit so to do . . .'" *West* v. *Gammon et al., supra,* at 428. See also *Opinion of Justices,* 9 Allen (Mass.) 585 (1866).

The only valid exception to this "moss-grown rule of the common law" is found in various statutory enactments, barring the acceptance of the guilty plea to capital crimes. See, e.g., N. Y. Code Cr. P. §332 (1889).[18]

Injection of the issue of insanity has never been deemed to establish an exception to this general rule.

Thus it is the law of England "that the issue of insanity at the time of the offense may not be raised either by the Judge or by the prosecution, but only by the defense."

---

[18] No valid analogy is possible between the *Lynch* rule and the statutory bar against a guilty plea in capital prosecutions. The death penalty case is a warranted exception. In that exceptional situation, denial to defendant of the waiver of his rights cannot conceivably operate to the defendant's prejudice. *Moreover, there is a world of difference between a statutory enactment, uniformly rejecting a guilty plea and providing for a trial in all cases of capital crimes—and a judge-made law, allowing for judicial discretion in the imposition of an insanity defense on a competent and recalcitrant defendant upon some evidence of insanity and then permitting incarceration of that defendant in a lunatic asylum on the basis of a doubt as to his mental health. The former exemplifies a government of laws, zealous in the protection of individual rights, the latter—a government of men permitting the transformation of the shield of the insanity defense into the sword of the prosecution in effecting the indefinite confinement of the accused without significant safeguards.*

See ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, Section 443 (1953).

The English position was stated by the Lord Chief Justice for the Court of Criminal Appeals in *Rex* v. *Oliver*, 6 Cr. App. 19, at 20 (1910):

> "The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the Judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel *to be used by him as he thought fit.*" (Emphasis supplied.)

Underlying the English rule is the clear-cut awareness of the oppressive results of a successful insanity defense in all but the most serious of cases.[19]

The rule enunciated by the Supreme Court of the State of Colorado seems substantially identical with the English

---

[19] Exegesis upon the English rule by a leading authority has stressed the importance of the rule for the protection of the rights of the defendant:

> "In a trial on indictment, it rests entirely with the accused to decide whether to set up the defence of insanity. . . . The prosecution are not allowed to give evidence of insanity, but should put the defending counsel in possession of any evidence that they may have on the subject, to be used by him if he thinks fit. . . . The judge is debarred from raising the insanity issue of his own motion. . . . To raise . . . [the insanity issue] invites prolonged if not permanent detention in a Broadmoor institution; not to raise it means that there is a chance of complete acquittal or of a limited prison sentence; and if the accused is in truth insane he may, notwithstanding the conviction, be transferred to a Broadmoor institution. Thus except in murder there is generally no disadvantage to the accused, but in fact an advantage, in not raising the defence." WILLIAMS, CRIMINAL LAW: THE GENERAL PART, §93 (London 1953).

rule. In *Boyd* v. *The People*, 108 Col. 289, 116 P. 2d 193 (1941), a unanimous Court declared:

> "Under no circumstances can the Court, on its own motion, enter the plea of not guilty by reason of insanity. Such a plea is in the nature of confession and avoidance . . . [T]he defense can only be raised by special plea." *Boyd* v. *The People, supra*, 116 P. 2d 193, at 195.[20]

The invocation of the alleged powers conferred upon the trial judge by the terms of Rule 9 of the Municipal Court in the District of Columbia, an exact replica of Rule 11, F.R.Cr.P., in no way changes this result. The language of the Rule is self-explanatory. "A defendant *may* plead . . . guilty." (Emphasis supplied.) Only for the plea of *nolo contendere* does he require "the consent of the court." Significantly, the Rule then goes on, "[t]he court *may* refuse to accept the plea of guilty"—but the scope of this power is directly delimited by linking it in immediate sequence with the preceding clause that it "shall not accept the [guilty] plea without first determining that the plea is made *voluntarily with understanding of the nature of the charge.*" (Emphasis supplied.) The intent that emerges is clearly one of affording the power of the court the necessary latitude in cases of reasonable doubt that the plea is made voluntarily with understanding of the nature of the charge and not in *any* case.

The Court's discretion, in sum, is limited to the protection of the accused; no authority is granted to the Court

---

[20] In that case, the Court reversed an order committing an accused to a mental hospital. The specific basis for reversal was the holding that the accused had been improperly acquitted by reason of insanity because the trial court had, *sua sponte*, entered a plea of not guilty by reason of insanity.

to reject a guilty plea with a view to prejudicing the accused and helping the Government.

In the case at bar the rejection of the guilty plea was not motivated by the desire of the Court to put the Government to the proof in order to protect the defendant's liberty; it was motivated instead by the desire of foisting a specific defense upon a recalcitrant defendant in order to effect his loss of liberty by confinement in a lunatic asylum.

The Notes of the Advisory Committee on the Federal Rules of Criminal Procedure make it plain that the rule-makers sought merely the re-enactment of previously established common law practice and sought to safeguard the defendant against the effects of duress and lack of understanding. See 18 U.S.C.A., F.R.Cr.P., Rule 11, Notes of Advisory Committee on Rules. See also *Fogus* v. *United States*, 34 F. 2d 97 (4th Cir. 1929), specifically cited by the Advisory Committee as illustrative of its intent and involving solely the question of whether a guilty plea has been freely and voluntarily entered "by a person of competent intelligence . . . and with a full understanding of its nature and effect and of the facts on which it is founded." *Id.*, 98.

It would follow that if, in the light of such understanding, the defendant, properly assisted by counsel, persists in his plea, no discretion resides in a Court to refuse it.

Although fully entitled to it, this case, however, is not dependent upon the enunciation of a principle as broad as this. We reiterate: *The question in this case is not whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to sparing him life or loss of liberty, but rather whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to depriving him of his liberty for an indefinite period in a lunatic asylum.*

C. *The competent defendant's right of free choice in the conduct of his case may be impinged only under extraordinary circumstances and then only in a way which provides the defendant with reasonable safeguards.*

In general, if a competent defendant is to be denied the right of making a free choice in the conduct of his case, the concept of competency becomes meaningless and the defendant is transformed into a pawn of governmental power.

The majority ruling of the United States Court of Appeals in the petitioner's case, moreover, restricts the right of a competent defendant in a federal criminal proceeding, who may need treatment, to make a free election as to the best available therapeutic conditions. Thus, e.g., a defendant, in need of psychiatric treatment, may be denied the right of choosing private psychiatric facilities of a significantly higher caliber than those prevailing in a public mental hospital or, indeed, he may be denied the right of the equally rational election of the psychiatric facilities of a penal institution in preference to those of a public mental hospital. All this would appear to be justified upon the assumption that the Government may exercise a parental role and treat the defendant as a child incapable of any choice, a view not consistent with traditional conceptions of competency, or upon the alternate assumption that the treatment facilities in public mental hospitals are indeed truly adequate. Neither of these assumptions can be rationally maintained in the light of existing realities in our system of democratic justice.

As aptly noted by the Supreme Court of the State of Iowa, "[r]easons other than the fact that he is guilty may induce a defendant to . . . plead [guilty]." None the less, if the concept of competency is not to be rendered meaningless, the defendant "*must be permitted to judge for him-*

self in this respect." (Emphasis supplied.) *State* v. *Kaufman*, 51 Iowa 578, 2 N.W. 275, at 276 (1879).

III.

The Action of the Municipal Court Has Deprived Petitioner of the Effective Assistance of Counsel to Which He Is Entitled Under the Sixth Amendment to the Constitution.

A free society, maintaining an accusatorial form of criminal justice, is bound to accord the defense counsel in a criminal case the unambiguous status of an advocate for the interests sought to be protected by his client.

The matter has been put succinctly by Maris, J., in *United States* v. *Handy*, 203 F. 2d 407, at 426 (3rd Cir. 1953), cert. den. 346 U.S. 865 (1953):

> "When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. For while he is an officer of the court his allegiance is to his client whose interests are ordinarily diametrically opposed to those of the state."

In a society placing a prime value on the individual, the defense counsel cannot be regarded as a mouthpiece of community policy, however progressive and enlightened, but solely as the representative of all of his client's interests. *Glasser* v. *United States*, 315 U.S. 60, at 70 (1942); see also *Von Moltke* v. *Gillies*, 332 U.S. 708, at 725 (1948).[21]

---

[21] In the words of the Canons of Ethics:

"The lawyer owes 'entire devotion' to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." ABA, CANONS OF PROFESSIONAL ETHICS, Canon No. 15.

The defendant, in turn, is entitled to "the guiding hand of counsel at every step of the proceedings against him." *Powell* v. *Alabama,* 287 U.S. 45, at 69 (1932).[22]

It would seem that, if the guiding hand of counsel is not to be denied, counsel should explain to his client the limitations of public psychiatric facilities to afford him an intelligent choice between existing alternatives. In the presence of overcrowded and inadequate psychiatric facilities in a public hospital, it may in fact be the duty of counsel to advise his client to enter a guilty plea to prevent his confinement in what both counsel and client may choose to regard as humiliating and counter-therapeutic conditions. This duty may be rendered more compelling by the possibility that a client, actually in need of psychiatric care, may be in a position to secure such care by private means through outpatient psychiatric facilities of a significantly more satisfactory character than those available within a public hospital.

Such a duty may be rendered equally compelling by the possibility that a client, in need of psychiatric care, may even receive more adequate treatment in a penal rather than a public psychiatric institution.[23]

---

[22] Counsel may advise the entry of a guilty plea to a given charge as essential to the protection of the defendant against a more serious charge which may emerge as a result of the evidence which may be brought to light in public trial. Counsel may also advise a guilty plea to a minor charge with a view to using the judgment of conviction obtained within that case as a bar to a threatened prosecution in a more serious matter arising out of a substantially identical transaction.

[23] In the case of *Sutherland* v. *United States,* U.S. Court of Appeals for the District of Columbia Circuit, No. 16,160 (1961), the physician in charge of one of the major departments of St. Elizabeths Hospital testified without contradiction that he was not seeing his patients "over once every two or three months" and that his examination of the patient in question was not as

It would seem, too, that if "the guiding hand of counsel" is not to be denied, counsel should provide an informed estimate of a client's chances of acquittal and the likelihood of leniency in sentencing upon a guilty plea and advise his client accordingly. See, e.g., Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204 (1956). Clients have traditionally depended on such advice. To deprive an accused of the right to follow the advice of counsel in these matters is to deprive him of a substantial personal benefit, traditionally linked to Sixth Amendment rights and never heretofore challenged in the courts.[24]

---

complete as it should have been. See Joint Appendix, *Sutherland v. United States*, C.A., D.C. Cir. No. 16,160, pp. 76-77 (1961). It is noteworthy in this connection that the department described in the *Sutherland* case had a better physician-patient ratio than the department in which the petitioner in this case languished for almost a year as the result of his first commitment by the Municipal Court. In the *Sutherland* case, appellant, after a conviction in the trial court notwithstanding an insanity defense, was transferred to the Reformatory at Lorton, Virginia, during the pendency of his appeal. After this transfer he informed the Court of Appeals that the psychiatric facilities made available to him at Lorton were so much more satisfactory than those which had been made available to him at St. Elizabeths Hospital that he wished to have his appeal dismissed. His motion was granted.

The question must therefore be raised in all seriousness as to whether counsel, engaged in the defense of a client, entitled to an insanity defense, are not entitled, nay, even required to inform their client of the varying quality of psychiatric care of penal and public psychiatric facilities to enable him to make a rational and free choice.

[24] Perhaps the most celebrated case highlighting the nature of such a benefit to a client is the Loeb-Leopold case of 1924. This Court will recall that as a matter of calculated strategy Clarence Darrow advised his clients to enter guilty pleas to charges of murder in the first degree. It seems plain that to have rejected the guilty pleas in that case would have deprived defendants of the benefit of the best legal judgment of the time, and, in all likelihood, of their lives as well. See WEINBERG, ATTORNEY FOR THE DAMNED, 23-24 (1957).

The denial of the right to enter a guilty plea on advice of counsel has been sought to be justified in the case at bar by reference to a purported supervening public interest. It is appropriate to point out, therefore, that it is Soviet and not American justice which requires a defendant's counsel to speak primarily for the interests of the state and only secondarily for those of the defendant. It is the view of Vyshinsky, one may recall, "that in presenting evidence in favor of a defendant . . . [the defense counsel] must proceed 'not from the interests of his client, but from the interests of the building up of socialism, from the interests of our state.'" I GZOVSKY & GRZYBOWSKI, GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE, 561 (London, 1959).

American jurisprudence seems devoid of comparable sentiments. Cf. BUTLER, LAWYER AND CLIENT, 15-25, 68, 69 (1871); STEWART, TRIAL STRATEGY, 398 (1940); BEANEY, RIGHT TO COUNSEL, 59 (1955); FELLMAN, THE DEFENDANT'S RIGHTS, 121-124 (1958).

In a word, if the respondent were to prevail, the role of counsel in criminal proceedings would be significantly restricted to conform with novel conceptions of the public interest.[25]

---

[25] The recent case of *Ex parte Hodges*, 166 Cr. App. 433, 314 S.W. 2d 581 (Tex. 1958) is illuminating.

Defendant, indicted for murder, announced ready for trial. Prosecuting counsel produced an affidavit that defendant was of unsound mind at the time of the crime. Instead of proceeding to trial upon the indictment, the Court impaneled a jury to pass exclusively upon the issue of defendant's sanity. Defendant's counsel "vainly protested the impaneling of a jury to pass only upon the issue of . . . [defendant's] sanity, [and] stated that he had announced ready for trial on the indictment for murder without raising the question of insanity and was not raising such question in his defense or in bar of prosecution." The jury, so impaneled, heard evidence solely addressed to the issue of defendant's sanity. A psychiatrist, called by prosecuting counsel,

One may inquire in all seriousness as to whether such restriction, if permitted by this Court, is then to stop at this point or whether it is to affect other activities of counsel, engaged in a criminal defense.[25]

---

over the objection of defendant, testified that defendant had been insane as of the time of the crime charged in the indictment. The jury found the defendant insane as of the time of its deliberation but not insane as of the time of the crime. The defendant was then committed to a public mental hospital. On appeal from a dismissal of a habeas corpus petition, the defendant was held entitled to the writ. In the words of the Texas Court of Criminal Appeals:

> "[*T*]*he defendant has been deprived of his rights guaranteed by the Sixth Amendment to the Constitution* of the United States . . . *to the effective aid of counsel.*" *Ex parte Hodges, supra,* 314 S.W. 2d 581, at 584. (Emphasis supplied.)

[25] Will the time come when defendants, committed to a Government mental hospital for observation in anticipation of an insanity defense, will be denied the right of following the advice of counsel that they are not to cooperate in such an examination, and is it possible that counsel may be held in contempt for giving such advice in the face of a court order for a mental examination? In view of the fact that the United States District Court for the District of Columbia has entered a specific order, directing a defendant to cooperate with Government psychiatrists over the protest of his counsel, these questions do not seem at all idle or far-fetched. See *United States* v. *John S. Sweeney,* Criminal Case No. 466-60, U.S.D.C., D.C. (1960).

IV.

D. C. Code Ann. §24-301(d), as Amended, Providing for the Mandatory Commitment of Any Person Acquitted by Reason of Insanity, Is Violative of the Requirements of Due Process of Law and Its Application to Petitioner Deprived the Petitioner of Due Process in the Instant Case.

A. *The statute authorizes condemnation without hearing.*

The statute provides for mandatory commitment of all persons acquitted by reason of insanity. Commitment is thus not conditioned on a judicial finding that the defendant is at the time of the trial, and not just at the time of the act charged, mentally ill and socially dangerous. It affords the defendant no opportunity to show that, notwithstanding a previously existing pathological mental state, he is not at the time of the adjudication mentally ill or socially dangerous. The presumption of a continuing pathological mental state cannot be invoked to maintain the statute on constitutional grounds.

A verdict of not guilty by reason of insanity provides no rational basis for the arbitrary conclusion that the defendant presently suffers from a mental disorder of which the offense was a product. Since, under *Davis* v. *United States*, 160 U.S. 469 (1895), the defendant is entitled to acquittal by reason of insanity merely upon the basis of a reasonable doubt concerning mental illness, a finding of not guilty by reason of insanity cannot be equated with an affirmative finding of the existence of mental illness at any time. Accordingly, the presumption of a continuing pathological mental state, which might otherwise be entertained, is invalid. Such a presumption is not rational and hence not consistent with due process of law. See *Tot* v. *United States*, 319 U.S. 463 (1943).

Assuming *arguendo* the validity of a presumption of a continuing pathological mental state, the citizen, under §301, is not even afforded an opportunity of showing that he is no longer mentally ill as of the time of the intended commitment, or that, if ill, he is not socially dangerous.

As the law stands in the District of Columbia today, therefore, a man can be locked up indefinitely in a lunatic asylum without any finding that he is insane.[27]

In sum, the statute deprives a citizen, guilty of no crime, of his liberty without an opportunity to be heard in advance of his commitment. Can it be doubted that such a deprivation is also a deprivation of due process of law?[28]

---

[27] The fact that petitioner's hearing in Municipal Court was not formally denominated a commitment hearing can in no sense render its end results valid under the Constitution since governmental authority cannot be allowed to accomplish by indirection what it may not do directly. See, e.g., *Speiser* v. *Randall*, 357 U.S. 513, at 526 (1958); *Bailey* v. *Alabama*, 219 U.S. 219, at 239 (1910).

[28] See the language of this Court in *Powell* v. *Alabama*, 287 U.S. 45, at 64 (1932):

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In Holden v. Hardy, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L. Ed. 780, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, Galpin v. Page, 18 Wall. 350, 368, 369, 21 L. Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants

A comparable statutory provision for civil commitment could and would be struck down as violative of due process of law. See *State* v. *Mullinax*, 364 Mo. 858, 269 S.W. 2d 72 (1954); *Barry* v. *Hall*, 98 F. 2d 222 (D.C. Cir. 1938).

It will not do to say that a criminal commitment law can accomplish what a civil commitment law may not. See *Speiser* v. *Randall*, 357 U.S. 513, at 526 (1957).

A statutory provision for mandatory commitment after an acquittal by reason of insanity, similar to §301, has in fact been invalidated as violative of due process in *Underwood* v. *People*, 32 Mich. 1 (1875). In the words of the Court:

> "[T]he more serious difficulty is in the nature of the proceedings themselves. In the first place the prisoner is sent into confinement without any legal investigation into his condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offense and the trial." *Id.*, at 5.

It will not "do to say in such a case that relief can be obtained afterwards by habeas corpus." *State* v. *Arnold*, 356 Mo. 661, 204 S.W. 2d 254, at 260 (1947).

The loss of liberty, without a hearing, even for one day, would seem intolerable under democratic justice. As a matter of practical fact, however, this Court may notice that habeas corpus petitions, challenging confinement at St. Elizabeths Hospital after an insanity acquittal, are gen-

---

all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

erally not considered for many months. Overcrowding at St. Elizabeths Hospital makes the completion of a mental examination in anything less than ninety days impossible. See generally, JUDICIAL CONFERENCE OF THE D. C. CIRCUIT, PROCEEDINGS, May 26, 1960, 61-63 (1960).

Experience with recent cases indicates that active consideration of a habeas corpus petition is often deferred far beyond three months.

The following is illustrative. A defendant charged with the commission of a crime on July 20, 1959, was acquitted by reason of insanity in October of 1960. In May of 1961, the District Court for this Circuit refused to accord that defendant a hearing upon a habeas corpus petition on the ground that his action was "premature." *In the Matter of Whittaker*, H.C. 83-61 (U.S.D.C., D.C. 1961). When the defendant persisted by filing a fresh habeas corpus petition in October of 1961, the District Court refused even to issue a writ to inquire into the defendant's sanity. *In the Matter of Whittaker*, H.C. 252-61 (U.S.D.C., D.C. 1961).[29]

---

[29] The case is now in the United States Court of Appeals for this Circuit. See *Whittaker* v. *Overholser*, No. 16,481. No corrective action by the Court of Appeals in this particular case is likely to bring about a significant change in the delay between acquittal by reason of insanity and active consideration of a defendant's release under existing conditions.

Moreover, having been deprived of his liberty upon the ground that there was some reasonable doubt as to his sanity, the beneficiary of an insanity acquittal is vouchsafed his release on habeas corpus *only* if he can prove beyond a reasonable doubt that he has recovered his sanity and that he will not in the reasonable future be dangerous to himself or others. See *Overholser* v. *Russell*, *supra*; *Ragsdale* v. *Overholser*, *supra*.

B. *Application of the statute on the basis of a discretional invocation of the insanity defense by the Municipal Court provides no ascertainable standards in bar of arbitrary action.*

The Municipal Court invoked the insanity defense upon the basis of a mere psychiatric certification.

In upholding such action the United States Court of Appeals for the District of Columbia Circuit did not see fit to enunciate any ascertainable standard for judicial action to effect the loss of liberty of the defendant by criminal commitment.

No specific or definite act was provided as a basis for the initiation of commitment to a mental hospital under the auspices of the D. C. statute, as thus interpreted.

One might say, as did this Court in *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, at 89 (1921), that the rule thus created, "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

Which citizen is to be afforded the "benefit" of the insanity defense authorized under *Lynch*? Is it to be the traffic violator or the citizen who has spat upon a sidewalk? Is it to be the robber, the arsonist or the businessman who has engaged in a violation of the antitrust laws? Is it to be the vagrant, the political or religious heretic, or the "subversive"? And is such an insanity defense to be invoked upon the basis of a psychiatric letter suggestive of major or of minor mental illness or upon the basis of a letter written by a disaffected spouse, co-worker or the village gossip?

Lynch provides an infinity of possibilities without in any way providing notice as to what it is that one should be on guard against to escape the "benevolent" working of an insanity defense which is calculated to result in one's loss of freedom by confinement in a lunatic asylum. *Lynch*, moreover, provides no safeguard that judicial authority in this context will not be used "with an evil eye and an unequal hand." *Yick Wo* v. *Hopkins*, 118 U.S. 356, at 373-74 (1886).

V.

Even if the Extraordinary Procedures in this Case Were Found to Be Consistent With Due Process of Law, the Confinement of Petitioner Within the Mental Hospital Facilities Described Above Would Violate Due Process of Law in Its Own Right.

Inadequacy of treatment within the context of enforced hospital confinement in a case such as this is conducive not solely to the creation of an atmosphere of bitterness and despair, but also to the deprivation of due process guaranteed under the Fifth Amendment to the Constitution.

It is submitted that the forcible commitment of an individual acquitted by reason of insanity to a mental hospital or indeed the forcible commitment of any individual to a mental hospital is constitutionally justifiable only upon the assumption that that individual will receive needed psychiatric treatment and rehabilitation. Lack of adequate psychiatric treatment may mean confinement for life of patients who are curable. Thus, the tolerance of inadequate treatment facilities creates a situation in which a citizen, guilty of no crime, can be incarcerated in a mental hospital

for life.[30] The time has come to speak of "medical due process" in this context. See Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L. J. 1178 at 1203 (1947).

The fact that the requirements of due process of law have not as yet been authoritatively defined as *requiring* adequate psychiatric treatment as a condition precedent to any continued form of enforced psychiatric hospitalization does not militate against the conclusion that such should be the demand of due process in our day. See, e.g., testimony of Dr. Morton Birnbaum in I HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, U. S. SENATE, 87th Cong., 1st Sess. 273 (1961).

As expressed by Mr. Justice Frankfurter for this Court:

> "[B]asic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in

---

[30] In this light the enactment of the mandatory commitment clause of D. C. law in the absence of adequate treatment facilities within the District raises serious doubts concerning its constitutionality.

It is fitting in this connection to recall the warning uttered by one of the leaders of contemporary criminal law reform and in the integration of the law and the behavioral sciences. As seen by the late Professor George H. Dession, a "healthy penal adjustment" in the individualization of the treatment of the social misfit requires material and human resources of an order we have not yet accustomed ourselves to expend. "Failing . . . [such an] adjustment," inveighed Professor Dession, "the professing of policies of rehabilitation . . . can mean nothing more nor less than a scrapping of those rather precious, if imperfect, guarantees of individual liberty which represent a substantial percentage of the profits of centuries and which are summed up in the maxim 'Nulla Poena Sine Lege.'" Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L. J. 319, at 340 (1938).

its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U.S. 25, at 27 (1949).

Protection of the right to treatment, as essential to ordered liberty, can be further justified in this context by reference to the progress of the free world in this field. It is this country which has lagged in securing to the mental patient humane conditions of confinement. The World Health Organization in reporting on a survey of existing legislation in other countries has had occasion to observe that "in addition to seeing that patients are not unjustifiably detained . . . [an] inspectorate is . . . concerned [in many countries] with insuring that patients are properly treated. To this end inspectors . . . are allowed access to hospitals at any time and patients and their relatives are permitted to approach them with complaints. Details of the treatment provided are also recorded and the inspectors have access to such records . . . " [31]

Moreover, our failure to insist upon the right to treatment as a condition precedent to any form of enforced confinement in a mental hospital tends to support a system of preventive or protective custody—mere penal incarceration—of persons not found guilty of any crime. Such a system is inconsistent with the ideals of a government that proclaims itself to be a government of laws and not of men. It is irreconcilable with ordered liberty. It has hitherto been encountered solely in the framework of the totalitarian state.

---

[31] WORLD HEALTH ORGANIZATION, HOSPITALIZATION OF MENTAL PATIENTS, A SURVEY OF EXISTING LEGISLATION 77 (Geneva, 1955).

As expressed by Fahy, J., concurring, in *Ragsdale* v. *Overholser*, 281 F. 2d 943, at 950 (D.C. Cir. 1960), absence of adequate psychiatric treatment tends to "transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense, and this even though the offense of which he was previously acquitted because of doubt as to his sanity might not have been one of the more serious felonies."

VI.

Congress Has Provided No License for the Forcible Imposition of an Insanity Defense Upon the Petitioner.

The statutory enactment, underlying the petitioner's commitment to St. Elizabeths Hospital, i.e., D. C. Code Ann. §24-301(d), as amended, properly construed, applies only to defendants who affirmatively raise the insanity defense.

The language of the legislative rationale for the enactment, contained in both Senate and House Reports, strongly suggests that the condition precedent to mandatory commitment was to be nothing short of the affirmative invocation of the insanity defense:

> "Where the accused has *pleaded* insanity, as the defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered." Senate Report No. 1170, 84th Cong., 1st Sess. (1955); House Report 892, 84th Cong., 1st Sess. (1955). (Emphasis supplied.)

It is common learning that the statutory enactment was prompted by congressional concern over the possibility that dangerous criminals might secure freedom to prey upon the public under the liberalized rule of insanity governing criminal proceedings adopted in the District of Columbia. See *Durham* v. *United States*, 214 F. 2d 862 (D.C. Cir. 1954).

It is self-evident that Congress knew of no single instance in which an insanity defense had not been freely elected by a defendant himself.

Moreover, as explained by Fahy, J., dissenting in the instant case, the accompanying statutory enactment, i.e., D. C. Code Ann. §24-301(e), governing release from hospital confinement after an insanity acquittal, read *in pari materia* with the commitment clause, cannot reasonably be interpreted as being addressed to "persons who have engaged in any kind of unlawful conduct, however minor, but only . . . [to] persons who have engaged in unlawful conduct of a dangerous character." *Overholser* v. *Lynch*, 288 F. 2d 388, at 397 (1961). Patently petitioner in the case at bar does not fall into the latter category.

VII.

Aside From the Above Considerations, Petitioner's Commitment Should Be Set Aside Under the General Supervisory Power of This Court as Inconsistent With the Enlightened Administration of Justice in the Federal Courts.

The supervisory power of this Court may be invoked in the case at bar to prevent not only a manifest injustice to petitioner but to safeguard the rational and efficient administration of justice in the federal courts. Cf. *McNabb* v. *United States*, 318 U.S. 332 (1943).

It is submitted that aside from all constitutional and statutory considerations, the procedure by which the Municipal Court effected the commitment of petitioner cannot commend itself to this Court as a proper exercise of judicial power and that repetition of commitment by such means should be prevented.

The supervisory power of this Court, moreover, may extend to prevent the stultification of the insanity defense, threatened by the opinion now under review.

When in 1954 the United States Court of Appeals for the District of Columbia Circuit announced a new test of criminal responsibility in *Durham* v. *United States*, 214 F. 2d 862 (D.C. Cir. 1954), it set in motion a wholesome trend in legal-psychiatric collaboration. This trend is about to be reversed under *Lynch*.

The Durham Rule has been followed by a significant body of jurisprudence in this Circuit. The case law created since that time has highlighted the need for an increased number of psychiatric examinations to assure the fair and rational administration of criminal justice in the District. See generally Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905 (1961). This case law has sparked, in turn, a trend toward the increasing use of psychiatric examinations in criminal cases in the District of Columbia,[32] a trend exemplified in other jurisdictions by such wholesome innovations as the Briggs Law in Massachusetts. See Mass. Ann. Laws, ch. 123, §100A (1955).

---

[32] "Durham and its progeny have had a tremendous influence on the administration of criminal justice in the District of Columbia . . . There are now more frequent pretrial psychiatric examinations; in major criminal cases, a mental examination is becoming routine." Krash, *op. cit. supra*, at 950.

What can be anticipated if petitioner's commitment is permitted to stand is the rejection of any psychiatric exploration of an accused's mental state under public auspices by an increasing number of defense lawyers. The consequences are easy to foresee.

In converting the insanity defense from a shield of the accused into a sword of the prosecution, the Court of Appeals is effectively inhibiting the exploratory use of the mental examination by defendant's counsel.

Subverted by *Lynch*, it is the very humanitarian philosophy of *Durham* jurisprudence which accounts for the retrogression in question.

A word on some characteristic phases of pre-*Lynch* case law is therefore in order.

In 1959 the United States Court of Appeals for the District of Columbia Circuit appropriately ruled that public psychiatric authorities, conducting a mental examination to inquire into the competency of a defendant to stand trial, pursuant to D. C. Code Ann. §24-301(a), must extend the scope of the examination, upon request of either Government or defense, to include the defendant's mental state as of the time of the alleged crime. See *Winn* v. *United States*, 270 F. 2d 326 (D.C. Cir. 1959); *Calloway* v. *United States*, 270 F. 2d 334 (D.C. Cir. 1959). The Court of Appeals in that context was clearly and properly concerned with the adequacy of psychiatric examinations for indigent defendants. Cf. *Williams* v. *United States*, 250 F. 2d 19 (D.C. Cir. 1957); *Blunt* v. *United States*, 244 F. 2d 355 (D.C. Cir. 1957).

The general practice evolved both in the District and Municipal Courts since that time has been for the Court to order an examination of a defendant, if at all, both as to

competency and as to mental state as of the time of the crime.

A defense counsel, solely concerned with a question of competency in a given case, is thus today on notice that the mental examination, ordered by the District or Municipal Court, will go well beyond the question he has raised and that now, under *Lynch*, even if his client be determined to be competent to stand trial, any evidence of mental disorder uncovered in the course of the examination may be used against him to effect his loss of liberty.

These are not conditions conducive, at least as far as the defendant's counsel is concerned, to maximal invocation of exploratory psychiatric examinations under public auspices.

Avoidance by members of the practicing criminal bar of requests for mental examinations may well extend to situations involving a question of the defendant's competency to stand trial. Such a development would imperil the cause of the fair trial as well as the rational development of the insanity defense.

Durham, it has been appropriately observed, can be "viewed as an experiment in collaboration between law and medicine." Krash, *op. cit. supra*, at 951. That it is a promising experiment is widely conceded. See generally Watson, *Durham Plus Five Years: Development of the Law of Criminal Responsibility in the District of Columbia*, 116 Am. J. Psychiatry 289 (1959); Sobeloff, *Insanity and the Criminal Law: From M'Naghten to Durham and Beyond*, 41 A.B.A. J. 793 (1955); Krash, *op. cit. supra*.

The reversal of *Lynch* is essential to the survival of *Durham* as such an experiment. In ordering such reversal this Court will secure the rights of the accused "by methods

that commend themselves to a progressive and self-confident society." *McNabb* v. *United States, supra,* at 344.

Conclusion

In sum, the petitioner's forefeiture of liberty under the circumstances described followed the transformation of his trial from one characteristic of the accusatorial to one characteristic of the inquisitorial system of litigation, significantly without the safeguards of the latter.

The petitioner has been denied the right of selecting his own trial strategy, available to any competent defendant; he has been denied effective assistance of counsel in the adversarial tradition, and was actually barred outright from following the advice he received from Court-appointed counsel in his case; he has lacked seasonable and effective notice as to what it was that he was called upon to defend himself against; he, as well as his counsel, have been unaware of the new role they were expected to play in the trial in which the usual and conventional positions were turned topsy-turvy and in which petitioner was not given an opportunity to be heard on the subject of his mental health; and petitioner has been condemned as insane under a standard of proof solely fit for Caesar's wife, i.e., upon the mere establishment of a reasonable doubt, however slight, concerning his mental health as of some past time.

It does not seem improper to suggest that in this process the prosecution succeeded in effecting the transformation of psychiatry into an instrumentality of oppression in the service of the Government.

By reason of the foregoing, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

RICHARD ARENS
2000 P Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

Of Counsel:

RUFUS KING
Southern Building
Washington 5, D. C.

Dated: October 19, 1961

APPENDIX

D. C. Code Ann. §24-301 provides:

"(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

"(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating

him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

"(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

"(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

"(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person

has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided,* That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital."

F.R.Cr.P., Rule 11 provides:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."